

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

**TORIANA MARCELLUS CAVE,)
Petitioner,) 1:09CV492
v.) 1:06CR474-6
UNITED STATES OF AMERICA,)
Respondent.)**

**ORDER AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE**

Petitioner, a federal prisoner, has submitted a document entitled as a brief supporting a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. However, no such motion has been filed in Petitioner's. Instead, it appears that the brief is the actual motion. It will be so construed. This motion cannot be further processed for the following reasons:

1. Petitioner already has a direct appeal pending in the United States Court of Appeals for the Fourth Circuit. While there may be no jurisdictional problem with a motion under § 2255 proceeding at the same time as a direct appeal, the Advisory Committee Note to Rule 5 of the Rules Governing Section 2255 Proceedings states that it is "inappropriate" to simultaneously maintain a direct appeal and a motion under § 2255. Where a prisoner files such a motion while a direct appeal is pending, the normal practice is to dismiss the § 2255 motion without prejudice to it being refiled once the direct appeal process has ended. *See, e.g., Capaldi v. Pontesso*, 135 F.3d 1122 (6th Cir. 1998); *United States v. Deeb*, 944 F.2d 545 (9th Cir. 1991).
2. Motion is not on proper § 2255 form - Forms enclosed.

Because of these pleading failures, this particular motion will be dismissed, but without prejudice to Petitioner filing a new motion properly following the 28 U.S.C. § 2255 forms, correcting the defects of the present motion after Petitioner's direct appeal has concluded. The Court has no authority to toll the statute of limitation, therefore it continues to run, and Petitioner must act quickly once his appeal ends if he intends to pursue this motion at that time. *See Spencer v. Sutton*, 239 F.3d 626 (4th Cir. 2001). To further aid Petitioner, the Clerk is instructed to send Petitioner new § 2255 forms and instructions for filing a § 2255 motion, which Petitioner should follow.

IT IS THEREFORE ORDERED that the Clerk is instructed to send Petitioner § 2255 forms and instructions.

IT IS THEREFORE RECOMMENDED that this action be filed and dismissed *sua sponte* without prejudice to Petitioner filing a corrected motion on the proper § 2255 forms once his direct appeal has ended.

/s/ Donald P. Dietrich
Donald P. Dietrich, U.S. Magistrate Judge

July 14, 2009